Neutral Citation No: [2020] NIQB 68 ***Judgment: approved by the Court for handing down (subject to editorial corrections)****	***Ref:*** **McF11350** ***Icos: 2016/102506*** ***Delivered:*** **20/11/2020**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

CHRISTIE GIBNEY

Plaintiff/Respondent;

-and-

MP COLEMAN LIMITED

Defendant/Appellant.

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Mr Lyttle QC with Mr Cleland (instructed by JMK Solicitors) for the Plaintiff
Mr Ringland QC with Mr Matthews (instructed by Kennedys Solicitors) for the Defendant

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McFARLAND J

[1] This is an appeal against the order of Master McCorry by which he ordered that 'split hearings' be conducted, to first determine the question of liability and then the issue of quantum (if required). The Defendant appeals on the basis that there should be one hearing to determine all issues.

[2] The case, as set out in the Pleadings, centres around an incident which occurred on the 30 June 2015. The Plaintiff was employed by the Defendant and was working on top of an asphalt storage bin clearing material from a ramp. He fell approximately 7 metres to the bottom of the bin, and then suffered a further fall of 3 metres from the bin onto the ground. He suffered catastrophic injuries. He claims against his employer the Defendant alleging negligence and breach of statutory duty. The Defendant denies liability on the basis that the Plaintiff was

carrying out a forbidden task in a forbidden area. In the event of a finding of liability, the Defendant asserts contributory negligence on the part of the Plaintiff.

[3] Order 33 Rule 3 of the Rules of the Court of Judicature provides –

> *"The Court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of law, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated."*

[4] The Master has a wide discretion when considering this Rule. Any statutory discretion should be exercised in a manner which furthers the objects of the provision (see *Padfield v Minister of Agriculture* [1968] AC 997). The objects of the Rules of the Court of Judicature are clearly set out in Order 1 Rule 1A –

> *"1A. - (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.*
>
> *(2) Dealing with a case justly includes, so far as is practicable -*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) saving expense;*
>
> *(c) dealing with the case in ways which are proportionate to -*
>
> *(i) the amount of money involved;*
> *(ii) the importance of the case;*
> *(iii) the complexity of the issues; and*
> *(iv) the financial position of each party;*
>
> *(d) ensuring that it is dealt with expeditiously and fairly; and*
>
> *(e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases.*
>
> *(3) The Court must seek to give effect to the overriding objective when it -*
>
> *(a) exercises any power given to it by the Rules; or*

(b) interprets any rule."

Megaw J in *Craig –v- Hamill* [1936] NI 78 at 93 succinctly summarised the objects of the then Rules of the Supreme Court as follows - "[to] provide the best way by which justice may be administered between parties, with the highest degree of accuracy, with expedition, and as economically as possible".

[5] An appellate court, although conducting a formal re-hearing, will be slow to interfere with a decision exercising such a discretion, provided that all material facts and factors appear to have been considered and immaterial facts have not.

[6] The leading authority in this jurisdiction relating to split hearings is *Miller –v- Peoples* [1995] NI 6. This in turn reflected the changing attitude to the matter in England, resulting first from the report of the *Winn Committee on Personal Injuries Litigation* (1968 Cmnd 3691) and the Court of Appeal decision in *Coenen –v- Payne* [1974] 2 All ER 1109. The report and the decisions heralded a movement away from the earlier practice not to make an order for split trials save in exceptional circumstances or on special grounds. The new approach was summarised by Lord Denning MR in *Coenen* at 1112 (d) as follows –

> "*In future the courts should be more ready to grant separate trials than they used to do. The normal practice should still be that liability and damages should be tried together. But the courts should be ready to order separate trials wherever it is just and convenient to do so."*

Justice and convenience are now the modern touchstones, and as Carswell LCJ in *Miller* at 10(a) observed, the approach that a court should take is a "*broad and realistic view of what is just and convenient, which should include the avoidance of unnecessary expense and the need to make effective use of court time."*

[7] In the course of both the written and oral submissions, I have been referred to various cases relating to the exercise of the discretion. As is often the case, care needs to be taken in analysing other decisions, as each case must be dealt with on its own facts and circumstances. These cases included *Coenen* (two consolidated actions concerning a road traffic collision between two vehicles, with allegation and counter allegation of negligent driving); *Miller* (a road traffic collision when the minor plaintiff was struck by a vehicle when crossing the road to attend a school fete with the action brought against the driver of the vehicle and the organisers of the fete for failing to take steps to protect pedestrians in the vicinity); *Mohan –v- Graham* [2005] NIQB 8 (a farm related accident with the plaintiff employed by the third defendant, a contractor working on the land of the first and second defendants); *McClean –v- McLarnon* [2007] NIQB 9 (a road traffic collision involving the plaintiff pedestrian emerging from between parked vehicles and being struck by another vehicle); and *McKelvey –v- Hill* [2019] NIQB 109 (a medical negligence action arising out of the circumstances of the plaintiff's birth).

[8] In each case, apart from *McKelvey*, split hearings were ordered. (The suggestion by the defendant in its skeleton argument that a split hearing was refused in *McClean*, is erroneous.) A common feature in each case was either the catastrophic nature of the injuries sustained by each of the plaintiffs, or (in *Coenen*) the complex loss of earnings claim brought by the plaintiff, with the need for evidence from witnesses based in Germany.

[9] When considering split trials dealing with preliminary points, there is a clear warning that judges should avoid, as Lord Scarman put it, "treacherous shortcuts" (see *Tilling –v- Whiteman* [1980] AC 1 at 25). In *Tilling* the County Court did not make findings of fact which in the fullness of time required a preliminary point to be resolved by the House of Lords with the case remitted back to the County Court, with additional delay, anxiety and cost.

[10] Hildyard J in *Electrical Waste –v- Philips Electronics* [2012] EWHC 38, refused to order split hearings, first to determine quantum and then, if required, to determine liability. At [5] - [7] the test was described as ultimately a "*common sense approach*" applying a "*pragmatic balancing exercise*". The factors which were considered relevant were –

(a) whether the prospective advantage of saving the costs of an investigation of the preliminary issue if other issues are not established, outweighs the likelihood of increased aggregate costs if a further trial is necessary;
(b) what are likely to be the advantages and disadvantages in terms of trial preparation and management;
(c) whether a split trial will impose unnecessary inconvenience and strain on witnesses who may be required in both trials;
(d) whether a single trial to deal with both liability and quantum will lead to excessive complexity and diffusion of issues, or place an undue burden on the Judge hearing the case;
(e) whether a split trial may cause particular prejudice to one or other of the parties (for example by delaying any ultimate award of compensation or damages);
(f) whether there are difficulties in defining an appropriate split or whether a clean split is possible; what weight is to be given to the risk of duplication, delay and the disadvantage of a bifurcated appellate process;
(g) generally, what is perceived to offer the best course to ensure that the whole matter is adjudicated as fairly, quickly and efficiently as possible.
(h) whether a split hearing would assist or discourage mediation and/or settlement; and
(i) whether an order for a split late in the day after the expenditure of time and costs might actually increase costs.

[11] The basic approach is that questions of liability and quantum should be dealt with at the same hearing. However departure from this approach is not confined to exceptional circumstances or special grounds. There needs to be a determination of what is just and convenient and that will be achieved by carrying out the balancing exercise assessment, taking into account how the case is likely to unfold according to whether or not there is a split hearing.

[12] Mr Ringland QC, for the defendant, made the observation that in his experience, it is usual for defendants to make applications of this nature and that the present application was merely a tactical device employed by the plaintiff with an intention to ground an interim payment application. It is the court's experience that most applications, of whatever type, made by parties tend to be motivated to gain tactical advantage. Such is the way of adversarial proceedings. Each case will, however, be dealt with by the courts on its own facts and each application on the merits, whilst maintaining equal footing as between parties (as per Rule 1A 2(a)). The prospect of interim payments is just one of the factors in play.

[13] As for the facts of this case, there was general agreement that the issue of liability could be dealt with after a relatively short hearing. The case, as pleaded, will require evidence from the plaintiff, and, I understand several work colleagues. The defence case is that the plaintiff was not instructed or authorised to be where he was, and in any event climbed over a guard rail which was in place to protect him should he have been at that location. The defence evidence will focus on training, management practices and instructions given, or not given, on the day in question. Engineering evidence is likely to be largely uncontroversial. There was little disagreement that the liability case would take 3 to 4 days of evidence. The potential outcome of any liability hearing would be a full dismissal of the action, or a finding for the plaintiff, either in full liability or reduced liability should there be contributory negligence. Save for the dismissal of the action, a split hearing may not bring a conclusion to the case, although with that issue resolved, and each party understanding what remains at stake, there could well be an impetus to resolve the case.

[14] Given the nature of the injuries, the quantum aspect of the case is complicated, particularly in relation to his future care needs, his case being that he is a tetraplegic, requiring 24 hour care. Mr Lyttle QC advised the court that approximately 12 experts will be required to give evidence, in the absence of the evidence being agreed, and there will be various aspects to the calculating of the loss. The experts will be from the fields of medicine, care provision, accountancy and architecture. Mr Ringland QC did not disagree with that assessment, although did observe that much of this evidence is likely to be agreed, save for some discrete matters. In the absence of agreement, the hearing on quantum is likely to take at least two weeks.

[15] There were no particular issues relating to the anticipated evidence that would suggest that a split hearing would not be advisable. These could arise if the credibility of any witness, particularly the plaintiff, is of particular relevance both in relation to liability and quantum (although Lord Denning MR in *Coenen* at 1112 (f) was not convinced by this, believing that a judge could well assess the credibility of the plaintiff within two hours, rather than needing two days) or a witness, for example a medical expert, who would be required to give evidence both in relation to liability and quantum (a point the Court of Appeal in *Miller* felt had been incorrectly considered by the first instance judge).

[16] I have carried out the suggested pragmatic exercise set out above at [10]. The matters in favour of a split are hearing are –

(a) The issues of liability and quantum are compartmentalised, and apart from the need for the legal representatives to attend both hearings, there would be no other duplication save for the plaintiff giving evidence twice. As the plaintiff has brought this application, that cannot be assumed to be a negative factor.
(b) The liability hearing (3 days) will be much shorter than the quantum hearing (2 weeks);
(c) The liability case is ready for hearing. The quantum case still requires a significant amount of preparatory work to be carried out (particularly by the defendant);
(d) There are no additional complexities arising from split hearings, either for the parties, their representatives or the judge. In fact, the liability hearing has all the hallmarks of being a straightforward matter;
(e) A dismissal of the case will conclude the matter. A finding of liability (whether at a full or reduced rate) may not avoid a final hearing on quantum, but will operate as an incentive to both parties, particularly the defendant, to settle the action, reducing costs and delay;
(f) There is no evidence to suggest that the defendant, which opposes the proposed split hearing, will be prejudiced in any way.

[17] In all the circumstances having considered the reasoned judgment prepared by Master McCorry, I am satisfied that he took these factors into account and that his decision was correct. I can find no fault in his reasoning. The appeal against his order is therefore dismissed. Master McCorry awarded the costs of the hearing below to the Plaintiff, and I will make a similar order, certifying for senior counsel.

[18] The matter will be listed for review in the near future for the purpose of listing the liability trial for hearing.